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In the Matter of)

Implementation of Section 4(g))
of the Cable Television)
Consumer Protection Act of 1992)

MM Docket No. 93-8

To: The Commission

COMMENTS OF SILVER KING COMMUNICATIONS, INC.

John R. Feore, Jr., Esq.
Suzanne M. Perry, Esq.
DOW, LOHNES & ALBERTSON
1255 - 23rd St., N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2500

Michael Drayer, Esq.
Vice President, Senior Counsel and
Assistant Secretary
Silver King Communications, Inc.
12425 28th Street, North
St. Petersburg, FL 33716
(813) 573-0339

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SUMMARY OF ARGUMENT

The stations owned and operated by Silver King Communications, Inc. ["SKC"] all have a home shopping entertainment format. This format was introduced following the Commission's Television Deregulation decision and represents precisely the type of innovative experimentation which the Commission anticipated its decision might stimulate. Indeed, home shopping represents the first successful application of interactive television, and may serve as a model for additional consumer-oriented technological

programming on several occasions and have concluded that it complies with the public interest. The information submitted herewith confirms the correctness of those conclusions.

The SKC Stations regularly ascertain the issues of concern to their communities. They locally produce and air public affairs programs which are specifically responsive to those ascertained local problems, needs and interests. They also air significant amounts of other types of non-entertainment programming, including religious programs specifically designed to address local communities' concerns with quality of life and the need for religious values. And even before it was statutorily required, they aired -- and continue to carry -- a significant amount of commercial-free educational and informational programming for children. The quantity of the SKC Stations' public service programming exceeds the Commission's prior non-entertainment programming processing guidelines as well as the amount of such programming carried by most similarly-situated non-network-affiliated UHF stations in their markets.

Not only does the SKC Stations' public service programming reflect operation consistent with the public interest: their policies with respect to employment and minority ownership confirm such operation. The SKC Stations' record of minority and female employment is exceptional: their minority and female employment profiles not only exceed the

Commission's EEO Processing Guidelines, but approach or in many cases exceed full parity with minority and female work force representation. Moreover, SKC, like its predecessor Home Shopping Network, Inc., is an industry leader in supporting minority ownership of television stations and has been instrumental in the continuation and operation of nearly a third of minority-owned television stations.

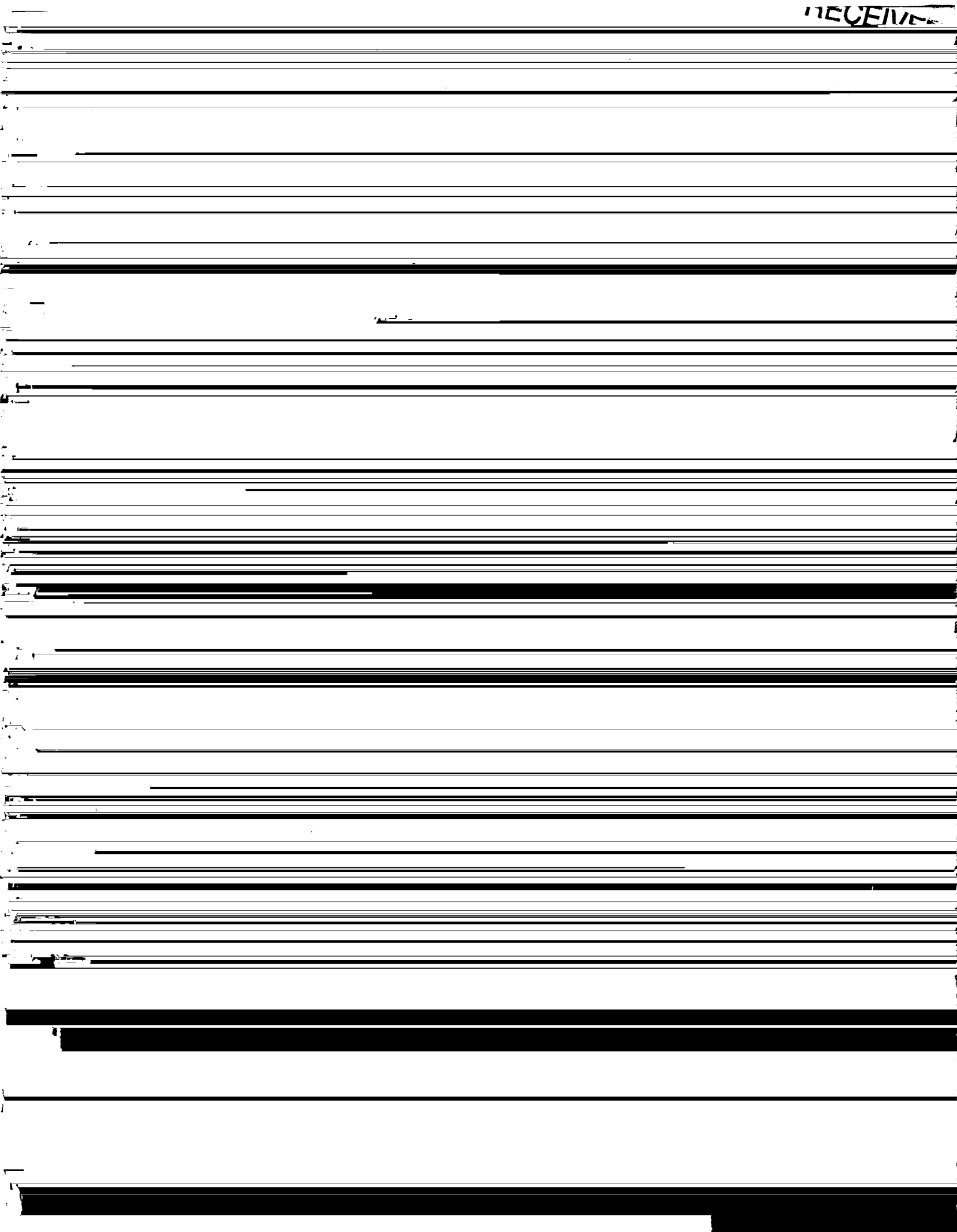
If the SKC Stations carried the same type of entertainment programming as conventionally-formatted stations -- game shows, violent dramas and sexually-explicit talk shows -- there would be no question that this record of public service programming and operations complied with the public interest. That the stations' entertainment programming is home shopping programming should not -- and cannot under the Constitution -- alter that conclusion. The social snobbery that looks down on home shopping programming because of its commercial nature has no bearing on whether the SKC Stations operate in the public interest. The fact is that the SKC Stations' public service programming and operations comply in every respect with applicable Commission requirements. The SKC Stations are clearly operating in the public interest and are thus entitled to must-carry rights on the same basis as traditionally-formatted stations.

Serious constitutional considerations also preclude the Commission from reaching any conclusion other than that

the SKC Stations are operating in the public interest. A denial of mandatory carriage eligibility based on the content of the SKC Stations' programming would constitute an impermissible denial of a benefit based on the content of

Congress premised must-carry requirements on the need to ensure over-the-air broadcast stations of continued access to the local audiences which they are licensed and obligated to serve through programming. Home shopping stations have the same public service obligations as conventionally-formatted stations, and the SKC Stations are complying with those obligations to the same or greater extent as conventionally-formatted stations. They accordingly should have the same entitlement to must-carry rights.

In pursuing that entitlement, SKC is not asking for any advantage over its conventionally-formatted competitors. It seeks only to be judged by the same public interest standards -- which do not evaluate the merit of entertainment programming -- as are applied to other stations. And using those standards, the SKC Stations' operations are clearly consistent with the public interest, convenience and necessity.



of the Home Shopping Club ["HSC"].^{3/} This network entertainment programming is divided into segments broadcast live with a host or hostess who presents merchandise available for purchase by viewers. Show hosts describe the merchandise one product at a time, conveying information concerning its quality, uses, attributes and prices. Viewers may order the merchandise by using a toll-free telephone number. The hosts also engage callers in spontaneous on-air discussions concerning the programming, the products and their previous home shopping experiences, and share personal chatter such as family anecdotes and

^{2/} (...continued)

WHSE-TV); Silver King Broadcasting of Ohio, Inc. ["SKO"], licensee of Television Station WQHS-TV, Cleveland, Ohio; Silver King Broadcasting of Southern California, Inc. ["SKSC"], licensee of Television Station KHSC-TV, Ontario, California; Silver King Broadcasting of Tampa, Inc. ["SKT"], licensee of Television Station WBHS-TV, Tampa, Florida; and Silver King Broadcasting of Vineland, Inc. ["SKV"], licensee of Television Station WHSP-TV, Vineland, New Jersey. These stations will be collectively referred to as the "SKC owned and operated stations" or the "SKC Stations."

^{3/} Home Shopping Club programming is provided by the Home Shopping Network, Inc. ["HSN"] through its wholly-owned subsidiary Home Shopping Club, Inc. The SKC Stations were all assumed by HSN and operated as subsidiaries of that

recipes. All of the SKC Stations' entertainment programming is broadcast live.^{4/}

The SKC Stations also carry a substantial schedule of non-entertainment public interest programming. It is this programming which is the primary focus of these Comments and which should be the Commission's preeminent consideration in this proceeding.

This proceeding was implemented pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992,^{5/} which added Section 614(g) to the Communications Act of 1934, as amended.^{6/} Section 614(g) requires the Commission to determine whether home shopping stations, such as the SKC owned and operated stations, are serving the public interest, convenience and necessity as a prerequisite to their qualification as local commercial television stations entitled to mandatory cable carriage rights under the 1992 Cable Act.

^{4/} The SKC Stations carry home shopping programming throughout most of the broadcast day and thus make no claim that their entertainment format is not predominantly home

SKC Stations' Operation in the Public Interest.

The SKC Stations' operations clearly are fully consistent with the public interest, convenience and necessity. Those operations are sanctioned by the Commission's Television Deregulation decision^{1/} and the SKC Stations' innovative programming represents precisely the type of experimentation which the Commission sought to foster with that decision.

Moreover, both the Commission and the courts have thoroughly evaluated the SKC Stations' entertainment and non-entertainment programming on multiple occasions and have uniformly concluded that they are fully consistent with the public interest. There is no basis for reversing this series of consistent Commission and judicial decisions.

Section 4(g) directs the Commission to consider the viewing of home shopping stations; other demands for the spectrum those stations now use; and those stations' role in providing competition for cable home shopping services. Nothing in the 1992 Cable Act's legislative history or in the plain terms of the statute, however, suggests that the Commission's considerations must or can be limited to those

^{1/} Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations, MM Docket No. 83-670, 98 FCC 2d 1076 (1984) ["Television Deregulation"], recon. denied, Memorandum Opinion and Order, 104 FCC 2d 358 (1986) ["Television Deregulation Reconsideration"], aff'd in part and remanded in part sub. nom., Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

three factors. Moreover, the fundamental touchstone of the public interest has long been a station's programming service to its community^{8/} and such local public service is the principal legal and policy justification for the mandatory carriage requirements contained in the 1992 Cable Act.^{9/} Thus it is clear that the Commission's principal focus here must be on home shopping stations' compliance with their public service programming obligations.^{10/}

Review of the SKC owned and operated stations' programming records incontrovertibly establishes that they

^{8/} See, e.g., Commission en banc Programming Inquiry, 44 FCC 2303, 2312 (1960) ["...the principal ingredient of [the licensee's obligation to operate his station in the public interest] is the diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his service area."]; FRC v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); NBC v. United States, 319 U.S. 190 (1943); Television Deregulation, 98 FCC 2d 1076; Deregulation of Radio, BC Docket No. 79-219, 84 FCC 2d 968, recon. granted in part and denied in part, 87 FCC 2d 797 (1981), aff'd in part and remanded in part sub. nom., Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983), on remand, 96 FCC 2d 930 (1984), vacated on other grounds and remanded sub. nom., Office of Communication of the United Church of Christ v. FCC, 779 F. 2d 702 (D.C. Cir.), on remand, 104 FCC 2d 505 (1985); c.f., Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 359 (D.C. Cir. 1949) ["...in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service."].

^{9/} See 1992 Cable Act, § 2(a)(10)-(11).

^{10/} Indeed, the Commission expressly invites "...information regarding how home shopping broadcast stations have been meeting their public interest obligations." Notice, 8 FCC Rcd at 661.

not only meet, but exceed all Commission public interest programming and related requirements and thus clearly operate in a manner consistent with the public interest. Submitted herewith in association with these Comments are 11 individual volumes which describe in detail the ascertainment, public service programming and equal opportunity employment practices of each of the SKC owned and operated stations [collectively referred to as the "SKC Station Attachments"]. The SKC Station Attachments conclusively demonstrate that SKC recognizes and abides by its public interest obligations as a television licensee.

Indeed, SKC (and HSN before it) has made compliance with those licensee obligations the paramount operational consideration from the time it acquired its first television stations in the fall of 1986. HSN established, and SKC today continues to follow, three principal public service programming objectives: to broadcast significant programming responsive to significant issues of concern to the community, including minorities and children; to provide a superior local programming service; and to provide public interest programming which is not only substantial in quantity and quality, but which is entertaining as well. The record demonstrates that SKC has achieved those objectives and that the SKC owned and operated stations comply with Commission public interest

requirements to the same -- or, with respect to many of its UHF competitors, an even greater -- extent than conventionally-formatted stations.

All of the SKC Stations regularly and methodically ascertain the issues which are significant to their communities. All of the SKC Stations utilize the results of this ascertainment in developing their local programming. All of the SKC Stations air substantial amounts of locally-produced programming directly responsive to significant local issues; other programming which also responds to those issues; and children's educational and informational programming. All of the SKC Stations also employ minorities and women in significant numbers and in substantial positions of responsibility to ensure that their programming optimally responds to concerns of the entire community. The SKC Stations' non-entertainment programming performance thus complies in every respect with applicable Commission public interest requirements.

Minority Ownership. No discussion of SKC's operation in the public interest would be complete without mention of its involvement and that of its predecessor, HSN, in fostering minority ownership of television stations: no company in America has done more to encourage such ownership. Those stations have likewise elected to adopt a home shopping format and, in consequence, a determination

that stations with home shopping formats are not operating in the public interest for purposes of cable carriage would have a devastating impact on minority television ownership in direct contravention of Congressional objectives.

Section 4(g) Considerations -- Viewing. Review of the three decisional factors specifically mentioned in Section 4(g) likewise supports a finding that the SKC Stations operate in the public interest.

There is significant viewing of the SKC Stations: statistics concerning Home Shopping Club membership in each station's service area demonstrate that a substantial proportion of market television households belong to the Club.^{11/} Moreover, more people watch the stations than make purchases. Thus it is clear that the SKC Stations' audiences are substantial and that denial of mandatory carriage would deprive significant numbers of persons of access to desired programming.

However, determinations concerning operation in the public interest should not turn on the popularity of particular programming. The Commission has long held that it will not be the arbiter of what is good or popular programming, and making entitlement to mandatory carriage a

^{11/} Persons who make a purchase automatically become members of the Home Shopping Club. Membership is also open to anyone who requests it.

function of program popularity is clearly inconsistent with both Commission precedent and constitutional requirements.

-- Competing Spectrum Demands. There are no competing demands for the broadcast frequencies used by the SKC owned and operated stations which are unique to those stations and which would justify disparate treatment for mandatory carriage purposes. Indeed, any conclusion that the SKC Stations' frequencies should be reallocated to other uses based on program content is forbidden by the Constitution. The Commission has determined that issues relating to competing demands and alternative uses for television broadcast frequencies are best determined in rulemaking proceedings and such proceedings' conclusions must be applied to all television stations which operate on particular frequencies without reference to the content of their programming.

-- Competition. The SKC Stations afford the principal off-air competition to cable home shopping services. Mandatory carriage of those stations would not only ensure cable subscribers of continued access to their unique, locally-oriented public service programming, but would also provide an alternative source of home shopping services.

Constitutional Considerations. It must, finally, be emphasized that Section 4(g) of the 1992 Cable Act

clearly is unconstitutional. It impermissibly treats similarly-situated broadcasters differently in a manner which bears no relationship whatsoever to the paramount governmental interest in mandatory carriage requirements: a television station's service to its community of license. Section 4(g)'s content-based classification focuses solely on the SKC Stations' entertainment format without acknowledging their public service programming. Indeed, Section 4(g)'s concentration on stations' entertainment format rather than on their public service programming highlights its unconstitutionality because entertainment formats are irrelevant to statutory must-carry objectives. Additionally, for the Commission to conclude that the SKC Stations are not eligible for must-carry would constitute precisely the type of content-based distinction that the Supreme Court has repeatedly denounced.

Conclusion. In sum, consideration of all relevant public interest factors demonstrates that the SKC owned and operated stations are clearly entitled to classification as local commercial television stations for purposes of mandatory cable carriage.

**The Commission and the Courts Have Already Determined That
The SKC Owned and Operated Stations
Operate in a Manner which is Fully Consistent with
the Public Interest, Convenience and Necessity**

Section 4(g) requires the Commission to decide whether the SKC Stations are serving the public interest,

convenience and necessity. Significantly, both the Commission and the courts have already made that determination time and again.^{12/} The Commission's 1984 Television Deregulation decision removed prior restrictions on the amount of commercial matter which television stations could provide and invited institution of innovative commercial practices. The court approved this action^{13/} and HSN accepted the Commission's invitation, instituting an unprecedented home shopping format which was and continues to be fully consistent with all Commission requirements and is immensely popular with the public.

Indeed, on several occasions, the Commission has specifically reviewed both the home shopping entertainment and non-entertainment formats of SKC Stations and has concluded that they are fully consistent with the public interest, convenience and necessity. These Commission judgments have been affirmed by the courts.

^{12/} SKC recognizes that the 1992 Cable Act directs the Commission to assess the eligibility of home shopping formatted stations for must-carry status notwithstanding prior Commission findings. Nonetheless, these findings are relevant to the Commission's actions herein because, unlike many traditionally-formatted television stations, some SKC Stations have undergone thorough Commission scrutiny of their programming, demonstrating that their superior performance more than matches their promise.

^{13/} Action for Children's Television v. FCC, 821 F.2d at 745.

Television Deregulation. The Commission's Television Deregulation decision eliminated its former programming guidelines^{14/} as well as the limits it had imposed on the amount of commercial matter which television stations could air.^{15/} The Commission concluded that marketplace forces would be more effective than restrictive regulation in furthering the public interest. The Commission found that, with respect to programming, "...licensees should be given the flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand." The Commission further found that, with respect to commercial practices, it could "...no longer continue to justify either the direct costs imposed by adherence to the commercial guideline -- the paperwork burden of record keeping, reviewing and monitoring -- or its more indirect costs such as possible anti-competitive effects or stifling commercial experimentation and intrusion into the realm of commercial speech protected by the First Amendment."^{16/} The Commission thus removed its restrictions on licensees' programming and commercial operations, while retaining the

^{14/} See Order, 43 FCC 2d 638 (1973); Order, 59 FCC 2d 491, 493 (1976); former 47 C.F.R. § 0.283(a)(7)(i)(A) and (ii)(A).

^{15/} See former 47 C.F.R. § 0.0283(a)(7).

^{16/} Television Deregulation, 98 FCC 2d at 1087-88, 1103.

fundamental obligation that licensees "provide programming that is responsive to the issues confronting its community."^{17/} Although seriously challenged by citizens' groups, the Commission's deregulation of commercial television was sustained by the court.^{18/}

The SKC Stations' home shopping format is completely consistent with the Commission's deregulation decision. Indeed, it is exactly the type of unique innovation which the Television Deregulation decision contemplated. Thus the Commission noted that "[a] significant danger posed by our commercial guideline is that it may impede the ability of commercial television stations to present innovative and detailed commercials...[O]ur regulation may also interfere with the natural growth and development of broadcast television as it attempts to compete with future video market entrants."^{19/} The Commission thus deregulated stations' commercial policies in

^{17/} Id. at 1091-92.

^{18/} Action for Children's Television v. FCC, 821 F.2d 741. The court also approved the Commission's similar decision deregulating radio. Office of Communication of the United Church of Christ, 707 F.2d at 1437.

^{19/} Television Deregulation, 98 FCC 2d at 1104.

order to "...promote licensee experimentation and otherwise increase commercial flexibility."^{20/}

The Commission is charged with defining and implementing the public interest^{21/} and its Television Deregulation decision exercised that authority in determining that formats which involve presentation of commercial content are not in conflict with the public interest. This decision was affirmed^{22/} and it thus necessarily follows that operations sanctioned by deregulation are also consistent with the public interest. More particularly, the SKC Stations' home shopping entertainment format was encouraged by and is consistent

^{20/} Id. at 1105. Indeed, the Commission has stated that "HSN, with its unique programming fare, method of generating revenues, and operational approach, would appear to be the kind of innovative enterprise the Commission was encouraging in that decision [American Broadcasting Co., Inc., 11 FCC 2d 1967)]." Home Shopping [Network] [sic], Inc., 4 FCC Rcd 2422, 2423 (1989).

^{21/} See, e.g., FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981).

^{22/} That Television Deregulation has achieved its goal of assisting commercial television's development is evidenced by the fact that as of September 30, 1984, there were 893 operating commercial television stations ("Broadcast Station Totals for September 1984" [October 12, 1984]), while as of January 31, 1993, there were 1146 such stations ("Broadcast Station Totals as of January 31, 1993" [February 11, 1993]). This growth vindicates deregulation and confirms its continued validity. To the extent the Commission seeks to revisit deregulation, compare Notice, 8 FCC Rcd at 661, that is a matter which must be addressed in a separate rulemaking; it is not appropriate for consideration here.

with the Commission's judicially-approved deregulation decision. Indeed, the Commission and the courts both have reviewed the SKC Stations' operations and concluded that the stations operate in the public interest.

Prior Public Interest Findings. Petitions to deny applications for consent to HSN's acquisition of Television Stations WHSW-TV (then WJKL) and WQHS-TV (then WCLQ) challenged, among other matters, their proposed home shopping entertainment format. After reviewing a complete record, including the results of a petitioner's monitoring of WSHH-TV's actual programming as well as the applicants' statements concerning their programming proposals, the Commission's Mass Media Bureau denied the petition.^{23/}

An application for full Commission review of that action was filed which again challenged the stations' proposed entertainment and non-entertainment programming. The Commission affirmed the staff's decision, concluding that home shopping entertainment programming is "consistent with the public interest;" that it had not been "...shown how Silver King's approach [to non-entertainment programming]...is not addressing the issues identified in the stations' programs/issues lists;" and that the stations

^{23/} Letter to David Dasef, Esq., MM Bur. (November 6, 1986).

involved "...have presented programming responsive to issues of concern in those communities."^{24/}

The Commission's decision was then challenged in court and was affirmed by the United States Court of Appeals for the District of Columbia Circuit.^{25/}

The general programming format of the SKC Stations also was challenged in connection with the purchase of Television Station WHSP-TV (then WSJT), Vineland, New Jersey, by another HSN subsidiary. In that case, as well, the Commission reviewed a comprehensive record which included detailed information concerning the station's non-entertainment programming (as well as its shop-at-home entertainment format) and concluded that such programming was consistent with the public interest.^{26/} The court in UCC also affirmed that Commission determination.

The Commission once more thoroughly considered and approved the SKC Stations' general entertainment and non-entertainment programming in rejecting a petition to deny the 1989 license renewal applications of Television Stations WHSP-TV and WHSE-TV. It reviewed a complete record

^{24/} Family Media, Inc., 2 FCC Rcd 2540, 2542-43 (1987).

^{25/} Office of Communication of the United Church of Christ v. FCC, 911 F.2d 803 (D.C. Cir. 1990) ["UCC"].

^{26/} Silver King Broadcasting of Vineland, Inc., 2 FCC Rcd 324 (1986), recon. denied, Press Broadcasting Co., 3 FCC Rcd 6640 (1988), aff'd, UCC, 911 F.2d at 812.

concerning the stations' programming and concluded that "...petitioners have failed to make a prima facie case regarding the licensees' issue responsive programming obligations..." and, more particularly, that "...there are no substantial and material questions regarding the licensees' issue responsive programming."^{27/}

Finally, each of the SKC Stations has filed a license renewal application and each of those applications has been granted, reflecting additional, repeated Commission determinations that those stations are operating in a manner consistent with the public interest, convenience and necessity.^{28/}

^{27/} Silver King Broadcasting of Vineland, Inc., 5 FCC Rcd 7499, 7500-01 (1990).

^{28/} See BRCT-890119KG, granted May 1, 1991 [WHSE-TV]; BRCT-910529KE, granted September 26, 1991 [WHSW-TV]; BRCT-881123KG, granted March 20, 1989 [WHSW-TV]; BRCT-890130KI, granted May 25, 1989 [WHSI-TV]; BRCT-920528KO, granted October 1, 1992 [WQHS-TV]; BRCT-920731KX, granted November 30, 1992 [WHSP-TV]; BRCT-920918KL, granted September 30, 1992 [WHSW-TV]; BRCT-870728KH, granted November 16, 1987, and BRCT-920731KT, granted March 1, 1993 [WEHS-TV]; BRCT-880330KJ, granted July 21, 1988 [KHSW-TV]; BRCT-880328KI, granted July 21, 1988 [KHSX-TV]; BRCT-911001LZ, granted January 27, 1992 [WBHS-TV]; BRCT-880725KK, granted November 23, 1988 [KHSC-TV]; BRCT-911001KW, granted October 1, 1991 [WYHS-TV]. SKC acknowledges Congress' attempt to distinguish between the "public interest" as applied to renewal decisions and the "public interest" necessary to must-carry eligibility. Assuming that there can be two measures of public interest operation, SKC respectfully suggests that the former standard -- which controls the ultimate right to operate -- must of necessity be stricter than the latter. Accordingly, the Commission's grants of the SKC Stations' renewals stand as compelling evidence that
(continued...)